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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1369

WILLARD F. MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February, 1971

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

WILLARD F. MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Willard F. Moore petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on October 19, 1970, and its judgment of January 21, 1971, denying rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (App. 1a-7a). The Court of Appeals denied rehearing without opinion (App. 8a).

JURISDICTION

Petitioner was convicted by a jury of violation of D.C. Code §§ 22-1301 and 2201 on June 10, 1969, in the United States District Court for the District of Columbia and was sentenced in that Court on August 15, 1969. The judgment of the Court of Appeals affirming petitioner's conviction was entered on October 19, 1970 (App. 1a). A petition for rehearing was denied on January 21, 1971 (App. 8a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether petition was denied his fundamental constitutional right to trial by an impartial jury, where, in a criminal prosecution for offenses requiring specific intent, in which petitioner defended primarily on the ground of his lack of specific intent due to intoxication, the trial judge (a) erroneously explained to the jury the manner in which specific intent might be proved and (b) failed entirely to instruct the jury that intoxication might negate specific intent?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Sixth Amendment, United States Constitution, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

2. Article III, § 2 of the United States Constitution which provides in pertinent part:

> The trial of all crimes . . . shall be by jury . . . .

3. D.C. Code, § 22-1301 which provides in pertinent part:

> Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value . . . shall, if the value of the property . . . so obtained . . . is $100.00 or upward, be imprisoned not less than one year nor more than three years . . . .

4. D.C. Code, § 22-2201 which provides in pertinent part:

> Whoever shall feloniously take and carry away anything of value of the amount or value of $100.00 or upward . . . shall suffer imprisonment for not less than one nor more than ten years.

STATEMENT OF THE CASE

On November 18, 1968, the petitioner, Willard F. Moore, was indicted in the United States District Court for the District of Columbia on two counts charging him with violation of 22 D.C. Code §§ 1301 (false pretenses) and 2201 (grand larceny). On June 9 and 10, 1969, petitioner was tried by a jury in the District Court for the District of Columbia.

The Government's case, in substance, was as follows: Updike, the complaining witness, testified that on the morning of September 12, 1968, an individual unknown to him visited him at his apartment and represented himself as a detective (Tr. 54-55). (References to the trial transcript will be in the form "Tr.") The unknown individual then represented that Updike was in trouble (Tr. 56, 58, 59, 67, 68, 69, 77), and told Updike that he had to put up $10,000 bond (Tr. 56, 68-69). During the conversation, at a point after the unknown individual represented himself as a detective, petitioner knocked on the door of the apartment and was admitted (Tr. 57). Petitioner was introduced to Updike by the unknown individual only as his "buddy" (Tr. 57-58). The unknown individual requested and it was agreed that

petitioner would accompany Updike to a savings and loan association (Tr. 60).

At the savings and loan association, petitioner waited outside while Updike went in to withdraw his money (Tr. 61). Because the savings and loan did not have a large reserve, James F. Smith, an employee of the savings and loan, testified that he and Updike left the savings and loan to go down the block to a bank to get the money (Tr. 82). Upon leaving the savings and loan, Updike left Smith to talk briefly with petitioner (Tr. 83). After Updike rejoined Smith, they completed the transaction at the bank, and, upon their return to the savings and loan, petitioner was no longer where Updike had left him (Tr. 84-85).

Updike testified that he returned to his apartment with the money and received a phone call from the unknown individual asking him to bring the money to the Albert-Pick Hotel (Tr. 63, 74). Updike did this and encountered only the unknown individual to whom the money was delivered (Tr. 64). After the delivery of the money to the unknown individual, Updike testified that he again saw petitioner (Tr. 65).

The prosecution also called Detective Eldridge who testified that he was sent to the Updike apartment in response to a call from a bank stating that Updike had withdrawn a large sum of money (Tr. 87, 93, 94, 112, 113). As Updike was not there when he arrived, Eldridge set up a surveillance of the building (Tr. 96). As a result of this surveillance and later questioning of Updike, Eldridge had petitioner arrested and searched and recovered $800.00 from petitioner (Tr. 102-103). Detective Eldridge also testified that he recovered $1,000.00 from petitioner's suit case (Tr. 107-108).

Petitioner took the stand on his own behalf and testified that he had been drinking "the whole month off and on" prior to the time the offenses took place (Tr. 158). On the day before the offenses took place, petitioner "had hit a couple of bars" and had "had a few drinks" (Tr. 150, 142).

Petitioner then went to Bennie's Bar at about 8:00 p.m. and drank heavily with an unknown individual until "the wee hours of the morning" of the day the offenses took place (Tr. 143, 150). The following morning, the unknown individual awakened Petitioner at about 8:00 a.m. at which time Petitioner was too sick to eat breakfast and "was not up to walking" the distance from his apartment to Updike's apartment (Tr. 143). Petitioner specifically testified that when the offenses took place he "was under the intoxication of that night before," that he did not know where he was going with Updike, and that he "got sick two or three times along the way" (Tr. 145). The testimony of both Petitioner and Updike established that the offenses took place between 8:30 a.m. and 10:30 a.m. (Tr. 55, 59, 95, 150, 151, 153).

Petitioner's trial counsel, in his closing argument, emphasized petitioner's lack of knowledge and repeatedly suggested that petitioner had been intoxicated and therefore did not know what was occurring (Tr. 172-173, 175).

The trial judge, in instructing the jury, failed to mention or define specific intent, which is an essential element of both of the crimes alleged, and, in describing how the requisite intent could be proven, stated:

> Intent to defraud generally cannot be proved directly because as I have already stated to you in connection with knowledge, there is no means of fathoming the operation of the mind of another person.
>
> But, intent may be inferred by you from things spoken, things done, and all the other surrounding circumstances. *It may be inferred that one intends the natural and probable consequences of his act, but you are not required to so infer.* (Emphasis supplied.) (Tr. 187)

The trial judge gave no instruction regarding intoxication and its possible effect on the requisite specific intent.

The jury returned a verdict of guilty on both counts of the indictment on June 10, 1969 (Tr. 196). On August 15,

1969, the petitioner was sentenced to three to nine years on the larceny conviction and to one to three years on the false pretenses conviction, the sentences to be served concurrently.

Petitioner duly appealed to the United States Court of Appeals for the District of Columbia, raising numerous challenges relating to the trial judge's instructions to the jury. On October 19, 1970, petitioner's convictions were affirmed by the Court of Appeals. In its opinion, the Court of Appeals was critical of the trial court's failure to explain to the jury the crucial difference between general and specific criminal intent (App. 3a, 4a), and of improper language in the trial court's instruction on reasonable doubt (App. 4a-6a). The Court of Appeals also concluded that the trial court had erred in instructing the jury in a specific intent case that it may infer that one intends the natural and probable consequences of his acts without including the crucial words "knowingly done or knowingly omitted." However, the Court of Appeals found that since petitioner's trial counsel had made no objection and considering the charge as a whole, there was no plain error requiring reversal (App. 6a).

In the final paragraph of its opinion, the Court of Appeals considered petitioner's principal contention that he was entitled to an instruction on intoxication and agreed that in cases where the evidence warrants an instruction on intoxication that it is plain error to fail to give it. However, the Court concluded that petitioner was not entitled to such an instruction because "the only evidence of intoxication on the part of [petitioner] related to the evening before the offense. The evidence does suggest that [petitioner] at the time of the crime was suffering from a hangover. We know of no authority, however, which holds that such a condition precludes the possibility of specific intent." (App. 6a, 7a).

Petitioner duly filed a petition for rehearing in the Court of Appeals, and on January 21, 1971, petitioner's petition for rehearing was denied (App. 8a).

ARGUMENT

Petitioner has been denied his basic right to a trial by jury because of improper instructions relating to the manner of proof of specific intent, and as a result of the total failure of the trial court to instruct the jury that petitioner's defense of intoxication could negate the specific intent essential to a finding of guilty of the crimes charged.

In many contexts, this Court has upheld and reaffirmed the fundamental nature of an accused's right to trial by jury as set forth in Article III, Section 2, of the United States Constitution, and in the Sixth Amendment to the United States Constitution. E.g., *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 18 (1955); *Capital Traction Co. v. Hof,* 174 U.S. 1, 14 (1898). Necessarily encompassed within this basic right is the requirement that the jury be properly instructed by the trial court as to the standards it must utilize in deliberating and in determining the innocence or guilt of an accused. As has been stated:

> It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by insuring impartiality. *But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?* [Emphasis supplied.]

Williams v. United States, 131 F.2d 21, 23 (1942).

(a) In this case the Court of Appeals recognized that there were numerous defects in the trial court's instructions (App. 3a-6a). The Court of Appeals specifically found that the trial court had erred in instructing the jury in a specific intent case that "one intends the natural and probable consequences of his act" without including the additional requirement that the acts be "knowingly done or knowingly omitted" but then concluded that such error was not plain error requiring reversal. Such error, however, must be

deemed fundamental and, therefore, plain error in a case such as this where an accused frankly admits the acts but denies the knowledge necessary to establish specific intent. Under the instructions in this case, even if the jury accepted petitioner's claim of lack of knowledge, they may have concluded that they were permitted to infer the necessary specific intent by petitioner to commit the offenses from the mere fact of his admitted participation in certain events. The practical effect of the trial court's instructions was to eliminate the element of specific intent from the crimes charged.

Similar instructions have been criticized, even when properly given, in numerous Circuit Court cases from various circuits, as misleading to the jury, useless, and "an invitation to reversal;" whereas in other cases such instructions have been found acceptable. *Cohen v. United States,* 378 F.2d 751, 755 (9th Cir.), *cert. denied,* 389 U.S. 897 (1967); *United States v. Barash,* 365 F.2d 395, 402 (2nd Cir. 1966); *United States v. Releford,* 352 F.2d 36, 40 (6th Cir. 1965), *cert. denied,* 382 U.S. 984 (1966); *Mann v. United States,* 319 F.2d 404, 409 (5th Cir. 1963), *cert. denied,* 375 U.S. 986 (1964); *Chappell v. United States,* 270 F.2d 274, 279-280 (9th Cir. 1959); *Bloch v. United States,* 221 F.2d 786 (9th Cir. 1955), *reh. denied,* 223 F.2d 297 (1955); *Legatos v. United States,* 222 F.2d 678 (9th Cir. 1955); *Wardlaw v. United States,* 203 F.2d 884 (5th Cir. 1953). See also App. 5a. The present state of confusion in an area of critical importance to proper trial by jury in criminal cases should be resolved and standards set by this Court to remove the possibility of future error in the use of the above instruction and to enable petitioner to receive a trial by a properly instructed jury.

(b) Grossly compounding its error in instructing on the manner of proof of specific intent, the trial court failed to instruct the jury that if it believed petitioner's testimony that he was intoxicated that such intoxication could negate the specific intent required for the crimes with which petitioner was charged. The Court of Appeals agreed that the

failure to give an intoxication instruction where required by the evidence constitutes plain error, but concluded that the evidence in this case did not raise an issue on intoxication (App. 6a, 7a).

The proper standard for determining whether an accused is entitled to an instruction on his particular theory of defense was articulately formulated by the United States Court of Appeals for the District of Columbia in *Tatum v. United States*, 190 F.2d 612 (1951), were in reversing a conviction because of the trial court's failure to give an insanity instruction, the Court stated:

> We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for "*in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.*" [Citation omitted.] [Emphasis supplied.]

In cases where the crimes alleged require a finding of specific intent, the law is that an instruction on intoxication is mandatory "if sufficient evidence on the intoxication issue has been introduced so that a reasonable man could possibly entertain a doubt therefrom that the accused was able to form the necessary intent." *Heideman v. United States*, 259 F.2d 943, 946 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 959 (1959).

The standards enunciated in *Tatum* and *Heideman* were superficially recognized as the law by the Court of Appeals, but were not applied in this case. Instead, in finding that an instruction on intoxication was not warranted, the Court of Appeals rejected some of petitioner's evidence outright, and drew from other evidence inferences unfavorable to petitioner. At trial, petitioner took the stand and testified on his own behalf, frankly admitting his participation in

certain of the events involving the victim and the unknown individual but resting his defense on his testimony that he had no knowledge of what the unknown individual was doing nor why the victim and the unknown individual were cooperating with each other. Specifically, petitioner testified that he had drunk heavily the night before until the wee hours of the morning, that he was sick the following morning, and that at the time the crimes occurred he "was under the intoxication of that night before", *supra* at p. 5. Surely, such testimony constitutes, at the very least, some evidence of intoxication, even though it might be considered "weak, insufficient, inconsistent or of doubtful credibility" and "even though the sole testimony in support of the defense is [peitioner's] own."

Nevertheless, the Court of Appeals found there was no evidence of intoxication, apparently on the grounds (1) that petitioner's testimony of sickness at the time of the crime established that petitioner was suffering from a hangover and therefore could not be intoxicated, and (2) that petitioner had ceased drinking some five or six hours prior to the crimes and therefore could not be intoxicated at the time of the crimes. Such fact-finding and drawing of inferences from the evidence by the Court of Appeals is an improper intrusion into the jury functions of deciding whether to believe such testimony and of determining the weight, if any, to give it, and the inferences, if any, to be drawn from it. Petitioner's claim of intoxication clearly was a disputed issue of fact which must be resolved by the trier of fact.

Moreover, petitioner's claim of sickness and his admission that he had ceased drinking some five or six hours prior to the crimes are not in any way inconsistent with petitioner's claim of intoxication. Considerable medical and scientific research has been done of the effects of alcohol following consumption, and such research demonstrates that an individual can remain intoxicated many hours after consumption ceases. This is because inebriation (alcohol ingestion,

absorption through the stomach and intestinal walls, and distribution throughout the body) occurs at a much more rapid rate than detoxification (the destruction by the body of alcohol molecules, and the elimination thereof from the body). Alcohol is completely absorbed into the bloodstream forty to ninety minutes after ingestion but may not be completely eliminated from the body until twelve to twenty-four hours later.[1] In addition, the rate of detoxification is fairly constant for any individual, varies only within certain limits for all individuals, and is not significantly affected by either sleep or physical exertion.[2]

For both medical and legal purposes, intoxication is often measured in terms of the percentage of alcohol (measured by weight) in the bloodstream (measured by volume).[3] Two out of three persons are intoxicated after reaching a blood-alcohol level of from 0.101% to 0.15%, and about nine out of ten persons are intoxicated at a level of from 0.15% to 0.20%.[4] An average weight man will reach the first level after drinking five or six ounces of distilled liquor (about 2½ ounces of alcohol) and will reach the second level (0.151% to 0.20%) after seven or eight

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[1] See, for example, *National Institute of Mental Health* (HEW), *Alcohol and Alcoholism*, Chap. V (Public Health Service Pub. No. 1640, 1968); 2 *Gray's Attorneys' Textbook of Medicine*, ¶¶ 59A.30-59A.31-32 (3d ed. 1964); and *National Institute of Health* (HEW), *Alcohol and Traffic Safety*, Chap. IV (Public Health Service Pub. No. 1043, 1963); 167 *Journal of the American Medical Association* 1842, "The Physiological Action of Alcohol" (1958).

[2] Committee on Medicolegal Problems (AMA), *Alcohol and the Impaired Driver*, pp. 21-22.

[3] Thus, a blood-alcohol level of 0.15% indicates the presence of 0.15 grams of alcohol in every 100 cubic centimeters of blood, and an elimination rate of 0.018% per hour (about 1/3 of an ounce per hour) represents a reduction of 0.018 grams per 100 cubic centimeters per hour. See generally, *Alcohol and the Impaired Driver, supra*, p. 22; and 12 *Am. Jur. Trials*, 764, 765.

[4] *Alcohol and the Impaired Driver, supra*, p. 10 and Table 3 at p. 11.

ounces of distilled liquor (about 3½ ounces of alcohol).[5] After reaching any given blood-alcohol level, detoxification proceeds at an average constant rate of about ⅓ ounce of alcohol per hour, or about eight ounces of alcohol (approximately one pint of distilled liquor) every twenty-four hours.[6]

The foregoing medical and scientific data, as well as common sense, demonstrate that petitioner's statement that he was intoxicated can not properly be rejected by the Court of Appeals and that his testimony presents a question of fact for the jury as to his intoxication and its effect, if any, on his ability to form the requisite specific intent.

The conclusion by the Court that petitioner could not have been intoxicated because he had stopped drinking some hours prior to the crimes constitutes a finding of fact which only the trier of fact may resolve since the conclusion is not compelled by the testimony. Moreover, the Court of Appeals' belief that certain "hangover" symptoms which petitioner exhibited were necessarily inconsistent with his claim of intoxication directly conflicts with the fact that a person exhibiting symptoms of a "hangover" may still be intoxicated. As is stated in *Gray's Attorneys' Textbook of Medicine*, Vol. 2, para. 59A.32, "Detoxification and Elimination of Alcohol":

> Since alcohol is eliminated slowly, its presence in the brain during the long period of detoxification and elimination allows it to exert its toxic effects on the brain over the entire period.
>
> * * *
>
> The "hangover" symptoms of dizziness, headache, nausea and vomiting arise from a combination of

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[5] *12 Am. Jur. Trials*, 764, 765 (Figure 2B); and 167 *A.M.A.J.*, *supra*, pp. 1843-45.

[6] 2 *Gray*, *supra*, para. 59A.32; 167 *A.M.A.J.*, pp. 1843-45; *Alcohol and the Impaired Driver*, *supra*, p. 21; and Goldberg, "The Metabolism of Alcohol," in *Alcohol and Civilization*, p. 33 (Lucia ed. 1963).

> toxic effects . . . [including] direct effects of alcohol on brain centers . . . .

Consequently, the "hangover" symptoms exhibited by petitioner are consistent with his statement that he was intoxicated when the alleged crimes took place. In any event, assessing the weight to be given and the inferences to be drawn from petitioner's testimony is the unique role of the jury under proper instructions from the trial judge; the jurors who convicted petitioner were not apprised that petitioner's testimony, if believed by them, could justify a verdict of not guilty.

The fundamental right to trial by impartial jury is rendered meaningless and unavailing if the jury is allowed to consider evidence and convict an accused, absent any advice from the judge that the sole claim raised by the accused in his defense could negate an essential element of the crimes charged and thus justify a finding of not guilty. This Court should establish guidelines in the area of specific intent instructions and the physical and mental conditions which might negate specific intent in order that an accused properly raising an issue which bears on such intent may be assured an informed jury finding on the issue, and should reverse petitioner's conviction in order to make meaningful his right to trial by an impartial jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1971

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,483

UNITED STATES OF AMERICA

v.

WILLARD F. MOORE, APPELLANT

Appeal from the United States District Court
for the District of Columbia

Decided October 19, 1970

Mr. Thomas P. Meehan for appellant.

Mr. Herbert B. Hoffman, Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery,* United States Attorney, and *John A. Terry* and *Robert A. Shuker,* Assistant United States Attorneys, were on the brief, for appellee.

Before WRIGHT, MACKINNON and WILKEY, *Circuit Judges.*

PER CURIAM: Appellant was convicted of both counts of an indictment charging false pretenses and grand larceny. On appeal he alleges plain error by the trial court in (1) failing in its instruction to the jury to define specific intent when both crimes of which appellant was

convicted require such a finding; (2) in instructing the jury that "it may be inferred that one intends the natural and probable consequences of his act, but you are not required to so infer"; and (3) in failing to instruct the jury that intoxication could negate the specific intent essential to a finding of guilt.[1] We affirm.

While the Government concedes that the offenses of

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[1] Appellant also contends that the trial court's charge on reasonable doubt was incorrect under *United States* v. *Jacobs*, 134 U.S.App.D.C. 198, 413 F.2d 1105 (1969). In *Jacobs*, this court ruled erroneous an instruction advising the jury to rely on their "own experiences as citizens of this community." 134 U.S.App.D.C. at 199, 413 F.2d at 1106. The court rejected "all such references to prior knowledge, experiences and observations," noting that "an instruction so phrased might lead the jury to judge the evidence upon the basis of particular personal experiences * * *." 134 U.S.App.D.C. at 200, 413 F.2d at 1107. Here there was no such charge calling the jury's attention to particular prior experiences, although there was a general reference to certainty such as "you would not hesitate to act upon in the more weighty and important matters relating to yourself." We do not believe this focus on the jurors' personal lives was sufficiently misleading to constitute plain error. But far better would be the instruction in terms of what would cause "an ordinary and prudent person to hesitate and pause" which this court approved in *Scurry* v. *United States*, 120 U.S.App.D.C. 374, 375 and n.3, 347 F.2d 468, 469 and n.3 (1965), *cert. denied*, 389 U.S. 883 (1967).

One further contention, unrelated to the trial court's charge, is made by appellant. The contention is that the court erred in refusing to permit appellant, during the trial, to challenge the validity of his arrest as a basis for excluding evidence seized in a search incident thereto. Constitutional error in the admission of evidence may be raised at any time, including collaterally. *Kaufman* v. *United States*, 394 U.S. 217 (1969). Neither in the trial court nor on appeal did appellant indicate the kind of evidence he would offer to establish the illegality of his arrest. Under the circumstances, we think appellant should be relegated to his collateral remedy under 28 U.S.C. § 2255 (1964). *See Kaufman* v. *United States*, *supra*.

which appellant was convicted require proof of specific intent, the trial judge failed to use the phrase "specific intent" in his instructions. Instruction No. 42 of Criminal Jury Instructions for the District of Columbia (1966) defines intent and explains the critical difference between general and specific intent as follows:

> "Intent means that a person had the purpose to do a thing; it means that he made an act of the will to do the thing; it means that the thing was done consciously and voluntarily and not inadvertently or accidentally.
>
> "Some criminal offenses require only a general intent. Where this is so, and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act.
>
> "Other offenses require a specific intent. Specific intent requires more than a mere general intent to engage in certain conduct or to do certain acts. A person who knowingly does an act which the law forbids, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent."

This is a correct statement of the law which, if given, would have eliminated the specific intent issue from this case. The trial court, however, did give an adequate instruction on the intent necessary to convict appellant of the crimes of false pretenses and grand larceny.[2] Un-

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[2] The trial court, in explaining the intent necessary to convict appellant of the crime of false pretenses, said:

> "Whoever by any false pretense, with intent to defraud obtains from any person anything of value shall be punished as provided by law.
>
> * * * * *
>
> "Intent to defraud generally cannot be proved directly because as I have already stated to you in connection with knowledge, there is no means of fathoming the operation

der the circumstances, and in view of appellant's failure to except to the charge, we find no error requiring reversal.

Appellant also challenges the trial court's instructions insofar as they permit the jury to infer, in a specific intent crime, that one intends the natural and probable

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of the mind of another person.

"But, intent may be inferred by you from things spoken, things done, and all the other surrounding circumstances. It may be inferred that one intends the natural and probable consequences of his act, but you are not required to so infer.

"Intent to defraud may be imputed to a person if the evidence shows that he has obtained something of value from another person by means of false representations, knowingly made with intent to induce the action taken by the other."

In outlining the necessary intent for the crime of grand larceny, the trial court said:

"* * * [T]he property must have been unlawfully taken from the possession of another with the intent on the part of the taker to convert it to his own use.

* * * * *

"* * * [I]f a person by trick or fraud obtains the property of another with intent to convert it to his own use, and thereafter does so convert it, that would be larceny, and if the defendant were guilty of that in this case then he would be guilty under this indictment.

"It is necessary, however, that in a case of this kind, where the charge is obtaining personal property by trick or fraud, that at the time it is obtained there must be the fraudulent intent at that time by the party taking it, to convert it to his own use. If he takes it without any intent to convert it to his own use, * * * that would not be larceny, and if that was the circumstance that the jury found to be fact, the defendant would not be guilty.

"The question here is, did the defendant acquire this money by trick or fraud and at the time intend to convert it to his own use, and did he later convert it to his own use."

consequences of his acts. Counsel refers to several Circuit Court cases which criticize this instruction as "an invitation to reversal."[3] Counsel also points out that, in the cases where the charge is criticized, the charge included the requirement that the defendant's acts be "knowingly done or knowingly omitted" before any inference of intention arises. The charge here does not even include this language.

In a specific intent case, a charge that a person ordinarily intends the natural and probable consequences of his acts may be misleading. Certainly if given, the charge should contain the crucial words "knowingly done or

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[3] *Cohen* v. *United States*, 9 Cir., 378 F.2d 751, 755, *cert. denied*, 389 U.S. 897 (1967). The *Cohen* court pointed out that a natural-and-probable-consequences instruction may mislead the jury in at least three ways: "The jury may mistakenly believe that it is permissible to infer specific knowledge or intent solely from the doing of a particular act, without regard to the totality of the circumstances; or that the occurrence of the particular act shifts the burden of proof of knowledge or intent from the prosecution to the defense; or that the question is whether a reasonable man in similar circumstances would have had the requisite knowledge or intent, rather than whether the accused actually had it." *Ibid.* As the Second Circuit has pointed out, the instruction is not only misleading but also useless: "Despite its ancient vintage, * * * utterance of the quoted platitude serves no useful purpose, since insofar as the statement has logical validity the jury would know it anyhow * * *." *United States* v. *Barash*, 2 Cir., 365 F.2d 395, 402 (1966). *See also United States* v. *Releford*, 6 Cir., 352 F.2d 36, 40 (1965), *cert. denied*, 382 U.S. 984 (1966); *Mann* v. *United States*, 5 Cir., 319 F.2d 404, 409 (1963), *cert. denied*, 375 U.S. 986 (1964); *Chappell* v. *United States*, 9 Cir., 270 F.2d 274, 279-280 (1959). As a general rule, however, the cases have looked to the instructions as a whole to see whether other instructions may have sufficiently corrected the misimpression created by the improper one.

knowingly omitted," as indicated by the Criminal Jury Instructions for the District of Columbia.[4] Here these words did not accompany the charge, but no exception was taken thereto. Under the circumstances, and considering the charge as a whole,[5] we find no plain error.

Finally, appellant urges trial court error in failing to instruct the jury that intoxication could negate the specific intent essential to a finding of guilt. In a proper case, such an instruction would be required, even without a request, where sufficient evidence of intoxication was adduced.[6] But here the only evidence of intoxication on the part of appellant related to the evening before the

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[4] Instruction No. 43 of Criminal Jury Instructions for the District of Columbia (1966) reads:

> "Intent ordinarily cannot be proved directly, because there is no way of fathoming and scrutinizing the operations of the human mind. But you may infer as to the defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted."

[5] *See* Note 3, *supra*. The Government points out that the judge's instructions here included at least three references to the requirement of knowledge. That seems enough to correct any misimpression resulting from the natural-and-probable-consequences instruction. However, if the trial judge had not given the latter instruction, as he should not have done, there would have been no necessity for this court to examine the instructions as a whole on appeal.

[6] *Heideman* v. *United States*, 104 U.S.App.D.C. 128, 131, 259 F.2d 943, 946 (1958), *cert. denied*, 359 U.S. 959 (1959). *See also McDonald* v. *United States*, 114 U.S.App.D.C. 120, 122, 312 F.2d 847, 849 (1962) *(en banc)*; *Tatum* v. *United States*, 88 U.S.App.D.C. 386, 190 F.2d 612 (1951).

offense. The evidence does suggest that appellant at the time of the crime was suffering from a hangover. We know of no authority, however, which holds that such a condition precludes the possibility of specific intent.

Affirmed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,483

September Term, 1970
Criminal 1845-68
[Filed January 21, 1971]

UNITED STATES OF AMERICA,

v.

WILLARD F. MOORE, Appellant

Before: Wright, MacKinnon and Wilkey, Circuit Judges; in Chambers.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

/s/
Nathan J. Paulson
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1369

WILLARD F. MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–7a) is reported at 435 F. 2d 113.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1970. A petition for rehearing was denied on January 21, 1971. On February 19, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury instruction regarding specific intent was adequate.

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2. Whether the absence of an instruction on the relation of intoxication to specific intent constituted error.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of obtaining money by false pretenses (22 D.C. Code 1301) and grand larceny (22 D.C. Code 2201). He was sentenced to concurrent prison terms of one to three and three to nine years. The court of appeals affirmed.

The evidence showed that on September 12, 1968, Abraham Updike, responding to a knock at his apartment door, was confronted by a stranger who identified himself as a police detective (Tr. 55, 68). Moments later, there was another knock at the door, and the stranger admitted a second man, whom Updike identified in court as petitioner (Tr. 55, 66). Petitioner was introduced to Updike as a co-worker and "buddy" of the supposed detective (Tr. 57–58).[1] The "detective" then told Updike that the latter had been implicated in a narcotics offense and would have to post a $10,000 bond (Tr. 56–58, 68–69).[2] The "detective" then left the apartment, stating that he had to appear in court (Tr. 60).

Petitioner accompanied Updike to a savings and loan institution where he was to withdraw the $10,000 (Tr. 60–61). Carrying on a normal conversation, the two men walked from Updike's apartment to the

[1] It was stipulated by counsel that petitioner was not a member of any police force (Tr. 110).

[2] Police files revealed that Mr. Updike had no criminal charges lodged against him (Tr. 110–111).

savings and loan (Tr. 71).[3] While petitioner later claimed he was suffering from the effects of his drinking the night before and got sick two or three times along the way (Tr. 145),[4] Mr. Updike's testimony indicated that petitioner did not appear ill at any time (Tr. 71).

Upon reaching the savings and loan association, Mr. Updike went inside leaving petitioner outside (Tr. 61, 72, 145). The savings and loan had to obtain the money to honor the withdrawal from a bank down the street (Tr. 62, 82). James Smith, a representative of the savings and loan, accompanied Updike to the bank (Tr. 62, 82–83). As they left, Updike approached petitioner and explained the situation (Tr. 62–63). During this three minute conversation, Smith, who was on the opposite side of the street, observed petitioner (Tr. 83). In court, Smith identified petitioner as the man with whom Updike had conversed (Tr. 83–85, 87). At the bank, Updike received $10,000, consisting of $7,000 in twenty dollar bills and $3,000 in hundred dollar bills (Tr. 62, 73, 84).

When Updike returned to the savings and loan, however, petitioner had disappeared (Tr. 63, 85). After waiting for petitioner for some time, Updike returned home (Tr. 63, 85–86). Shortly after he arrived, he received a telephone call directing him to

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[3] The trip, from Updike's apartment at 1126 Eleventh Street, N.W., to the savings and loan at Second Street and Pennsylvania Avenue, S.E., took 30 to 45 minutes (Tr. 54, 61).

[4] According to petitioner, he met his unidentified accomplice at Bennie's Bar where the two men drank and carried on a conversation for several hours until the tavern closed (Tr. 143, 150–151).

take the money to 12th and L Streets, N.W. (Tr. 63). When he arrived there, he was met by the supposed police detective, who led him into the Albert Pick Motel and took the $10,000 (Tr. 64, 74–75). As Updike left, he observed petitioner enter the motel and proceed in the direction of the other man (Tr. 65–66, 75–76).

At the time of petitioner's arrest, a search revealed $800, in twenty-dollar bills, on his person. (Tr. 102–105). In a later search of his apartment, pursuant to a search warrant, police discovered $1,000, also in twenty-dollar bills (Tr. 105–108).

In his charge to the jury, the trial judge gave the following instruction regarding the intent necessary to convict petitioner of the crime of false pretenses (Tr. 185–187):

> Intent to defraud generally cannot be proved directly because as I have already stated to you in connection with knowledge, there is no means of fathoming the operation of the mind of another person.
>
> But intent may be inferred by you from things spoken, things done, and all the other surrounding circumstances. It may be inferred that one intends the natural and probable consequences of his act, but you are not required to so infer.
>
> Intent to defraud may be imputed to a person if the evidence shows that he has obtained something of value from another person by means of false representations, knowingly made with intent to induce the action taken by the other.

As for the intent necessary for conviction of grand larceny the judge stated (Tr. 190–192):

> [T]he property must have been unlawfully taken from the possession of another with the intent on the part of the taker to convert it to his own use. * * *
>
> [I]f a person by trick or fraud obtains the property of another with intent to convert it to his own use, and thereafter does so convert it, that would be larceny, and if the defendant were guilty of that in this case then he would be guilty under this indictment.
>
> It is necessary, however, that in a case of this kind, where the charge is obtaining personal property by trick or fraud, that at the time it is obtained there must be the fraudulent intent at that time by the party taking it, to convert it to his own use. If he takes it without any intent to convert it to his own use, that would not be larceny, and if that was the circumstance that the jury found to be fact, the defendant would not be guilty. The question here is, did the defendant acquire this money by trick or fraud and at the time intend to convert it to his own use, and did he later convert it to his own use.

Defense counsel did not object to the jury instructions, stating, in fact, that the court "covered it well." He did not request an instruction on intoxication (Tr. 193–194).

ARGUMENT

1. Petitioner contends that the court erred in its charge on the requisite intent regarding false pretenses because it instructed that the jury could infer that one intends the natural and probable consequences of his acts, without adding that such acts must be "knowingly done." However, as the court of

appeals held, the charge as a whole included references to the requirement of knowledge and therefore there was no "plain error" (Pet. App. 6a). In his instruction regarding the crime of false pretenses, the trial judge twice referred to the requirement of knowledge of falsity (Tr. 186). He explained, moreover, that the "intent to defraud may be imputed to a person" when "he has obtained something of value * * * by means of false representations, knowingly made with intent to induce the action taken by the other" (Tr. 187).

2. Petitioner also asserts that the court erred by not instructing the jury, *sua sponte,* regarding the effect which intoxication may have on the ability to form a specific intent to commit the crimes in question. He contends that his testimony was a sufficient foundation to require such an instruction. Petitioner testified that he had been drinking the night before the crime and that he did go home to bed (Tr. 143, 150–151). The following morning, he testified, he felt sick from the aftereffects of drinking (Tr. 142–144) and was "under the intoxication of that night before" (Tr. 145). These statements were not supported by any other witness.

An instruction on intoxication is necessary only if an adequate evidentiary foundation has been laid. *Kane* v. *United States,* 399 F. 2d 730, 736–737 (C.A. 9), certiorari denied, 393 U.S. 1057; *Heideman* v. *United States,* 259 F. 2d 943, 946 (C.A.D.C.), certiorari denied, 359 U.S. 959. As the court of appeals concluded, such a showing was not made here. At worst,

petitioner was suffering from a hangover. That condition raises no question of petitioner's ability to form the requisite intent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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